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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO MARGARITO CRUZ, Defendant and Appellant.	H042221 (Santa Clara County Super. Ct. No. C1109272)

I. INTRODUCTION

A jury convicted defendant Eduardo Margarito Cruz of first degree burglary (Pen. Code, §§ 459, 460, subd. (a); count 1)[1] and first degree robbery within an inhabited dwelling (§§ 211, 213, subd. (a)(1)(A); count 2). The jury also found true allegations that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C) & (b)(4)). Based on the gang allegation under section 186.22, subdivision (b)(4), the trial court sentenced defendant to an indeterminate term of 15 years to life for count 2. The trial court stayed the sentence for count 1 pursuant to section 654.

On appeal, defendant contends: (1) the trial court erred by admitting defendant's confession because the interrogation tactics rendered the confession involuntary; (2) the

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

prosecutor committed misconduct during closing argument; (3) the trial court erred by admitting statements about gang affiliation that defendant made during jail classification interviews; (4) the cumulative impact of the trial court's errors and prosecutorial misconduct deprived defendant of a fair trial; and (5) the trial court erroneously believed it lacked discretion to strike the gang allegation. For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

A. Home Invasion and Robbery

On October 20, 2009 at night, a female Sureño gang member, Marysol Argomaniz, knocked on the front door of 72-year-old Robert Salinas's home. When Salinas opened the door, defendant and another Sureño gang member, Jason Perez, appeared from behind Argomaniz and stepped inside the home. One of the men had a gun. Salinas saw the handle of the gun coming out of the man's jacket pocket. The armed man told Salinas to sit on the couch, and he wrapped Salinas's head and eyeglasses with duct tape. The armed man also took $80 from Salinas's wallet. Although he was not physically injured, Salinas was scared and afraid that the intruders would hurt him. While one person kept watch over Salinas, the other gang members grabbed items around the home. These items included a sewing machine, a television, a cell phone, and gifts that Salinas had received from his church. The gang members loaded the items into Salinas's car and drove off in the car.

B. Investigation

Following the incident, police officers collected evidence from Salinas's home, including a piece of duct tape found on the floor. The evidence was sent to a crime laboratory for DNA testing. In March 2011, police detectives received a notification that DNA on the duct taped matched the DNA of Jason Perez.

San Jose Police Detective Raul Corral created a photographic lineup, which included Perez's photograph. However, Salinas was unable to identify anyone from that lineup.

After showing Salinas the photographic lineup, Detective Corral and Detective Jesus Mendoza contacted and interviewed Perez. During the interview, Perez admitted his involvement in the crimes, and he also told the detectives that defendant was involved.

Detective Corral created another photographic line up, which included defendant's photograph. Detectives Corral and Mendoza showed Salinas the lineup, and Salinas identified defendant as the individual who had the gun, had duct taped Salinas, and had stood beside Salinas during the entirety of the incident. However, at trial, Salinas identified defendant as the man who had the gun in his pocket, but said that he thought defendant "had given it to the other guy." Salinas also indicated at trial that defendant was not the one standing next to him during the incident. Salinas said, "It was the other one, the one that stayed . . . right beside me."

On July 15, 2011, Detectives Corral and Mendoza interviewed defendant at the police station. Defendant was wearing a South Pole softball shirt and a blue cloth belt at that time. During the interview, defendant admitted that his nickname was "Little Silent." He also confessed that he and his companions had entered Salinas's home, grabbed items in the home, and put those items inside Salinas's car.

C. Jason Perez Testimony

Perez entered a plea agreement in exchange for his testimony at trial. At trial, Perez admitted that he was a member of the Varrio Sureños Malditos (VSM) gang. Perez testified that he had known defendant for three years prior to the incident, that defendant was also a VSM member, and that defendant went by the moniker, "Little Silent."

Perez recounted that on the day of the incident, he was contacted by a leader of the VSM gang, who was known as "Tigre." Tigre drove Perez, Argomaniz, and defendant to

the area near Salinas's home. Tigre informed them of the plan to rob and burglarize Salinas's home and "told everybody their specific jobs to do." Tigre handed a gun to defendant and instructed defendant that when the person opened the door, defendant should "jump out of the bushes and point the gun at the person and push him in the house." Defendant took the gun from Tigre and put it in his sweatshirt pocket. Perez testified that after Salinas opened the front door, defendant pulled out the gun and pointed it at Salinas's upper body. Perez recounted that once inside, Argomaniz stayed with Salinas in the living room. Perez then described how he and his companions took items from the home, loaded Salinas's car, and drove off.

D. Gang Expert Testimony

Christine Macias, a sworn officer and criminal investigator in the gang unit at the Santa Clara County District Attorney's Office, testified as an expert on criminal street gangs and gang crimes. Investigator Macias had investigated several gang incidents during her career, had personally contacted gang members, and had assisted other agencies in gang investigations.

Investigator Macias explained some general characteristics of gangs. Gangs operate by using fear, intimidation, and violence to gain respect, power, and control. She noted that gang members share common signs or symbols, use monikers, and have tattoos, which show membership in a certain gang.

Investigator Macias testified that the Sureños are one of the two major Hispanic street gangs in San Jose. Sureños are also referred to as southerners. The investigator testified that the primary activities of Sureños include crimes such as robbery, burglary, murder, shooting into an inhabited dwelling, possession of a firearm, carrying a concealed firearm, and vehicle theft.

The investigator explained that Sureños identify with the color blue, the letter "M," the number "13," three dots, and the word "trece." Sureño gang members wear clothing that incorporates the color blue, and they commonly wear blue cloth belts. The

investigator also noted that many Sureños wear clothing made by the "South Pole" brand because of its reference to the south.

Investigator Macias stated that there were subgroups within the Sureño gang. She mentioned the Varrio Peligrosos Locos (VPLS or VPL) and VSM.

E. Evidence of Gang Membership

On July 11, 2009, San Jose Police Officer Sergio Pires contacted defendant for a field interview. Defendant admitted he was a VPL Sureño gang member and that he had been a member for about one year. Defendant was wearing blue slippers and a blue bandanna. Officer Pires noted that defendant was frequenting an area known to be a Sureño neighborhood and that defendant was associating with other known gang members.

Other contacts defendant had with law enforcement officers were documented on field interview cards. In 2009, on July 15, August 7, August 9, and October 10, defendant was contacted by law enforcement while he was with other Sureño gang members. On July 2, 2011, defendant was contacted, and the officer documented that defendant had three dots tattooed on his left hand, was wearing a blue shirt and blue belt with the letter "M" in the belt buckle, and admitted he was a Sureño gang member.

Defendant also had several documented contacts with jail staff, in which he admitted his gang affiliation. On six occasions between December 5, 2009 and July 15, 2011, defendant was questioned about his gang affiliation for housing classification purposes, and he answered that he was a Sureño.

Investigator Macias opined that defendant was an active Sureño gang member. She based her opinion on defendant's tattoos, his admissions, the information on the field interview cards, and the fact that he had been associating with other gang members. The investigator also opined that defendant's companions in the incident were all Sureño gang members and that the crime was done for the benefit of the gang.

F. Defense Case

Before trial, defendant filed a motion in limine to exclude his confession, and the trial court held an Evidence Code section 402 hearing on the admissibility of the confession. At the hearing, defendant called Richard Leo, a social psychologist, who testified as an expert witness that defendant's confession was coerced.[2] The trial court denied the motion in limine, but it allowed portions of the transcript of Dr. Leo's testimony to be presented to the jury. The trial court limited the testimony to Dr. Leo's discussion of the general theory of false confessions and the types of interrogation tactics that could influence a confession, such as minimizing the crime and maximizing the punishment and mentioning family and religion.

Defendant did not call any witnesses at trial to testify on his behalf.

G. Convictions and Sentence

A jury convicted defendant of first degree burglary (§§ 459, 460, subd. (a)) and first degree robbery within an inhabited dwelling (§§ 211, 213, subd. (a)(1)(A)) and found true allegations that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C) & (b)(4)). As to the burglary offense, the jury also found true an allegation that a person other than an accomplice was present during the burglary (§ 667.5, subd. (c)(21)). The jury found an elderly victim allegation (§ 667.9, subd. (a)) and firearm allegations (§§ 12022.5, subd. (a), 12022.53, subd. (b)) not true. Pursuant to the gang allegation (§ 186.22, subd. (b)(4)), the trial court imposed a prison term of 15 years to life for count 2. The court stayed the sentence for count 1 pursuant to section 654.

[2] Further details of Dr. Leo's testimony and the motion in limine are discussed in the discussion section of this opinion.

III. DISCUSSION

A. Defendant's Confession

Defendant contends that the trial court erred in admitting his confession because the detectives' interrogation techniques rendered the confession involuntary. Defendant argues that the detectives used improper coercive tactics by implying that defendant would receive more lenient treatment if he admitted culpability, but harsher treatment if he denied involvement. Additionally, defendant claims that it was improper when the detectives falsely told defendant that his girlfriend had implicated him and that his DNA was found inside Salinas's house.

1. Defendant's Interrogation

Defendant was interviewed by Detectives Corral and Mendoza. He was 19 years old at the time of the interview. The interview was conducted in Spanish after defendant indicated that he preferred to speak in Spanish.[3]

After obtaining some background information, Detective Mendoza read defendant his *Miranda*[4] rights. Defendant responded that he understood his rights, and the interview continued.

The detectives asked defendant about a "mistake" he made in the past and whether October 20, 2009 had any significance to him. Defendant initially denied knowing anything and said there was nothing significant about that date. Detective Corral mentioned defendant's infant daughter and asked whether defendant wanted to "change [his] life" for his family. The detective urged defendant, "Let's not bullshit here, I am not going to tell you lies . . . nor my partner will tell you lies. . . . [T]here are some

[3] We have reviewed the videotape and the transcript of the interview, which includes an English translation.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

things that we can't tell you. [¶] . . . [¶] But we will know when you're lying." The detective told defendant that it was "better to say the truth . . . , and finish with all this."

After defendant continued to deny any knowledge of the crime, Detective Mendoza stated, "Well we already know what happened." The detectives showed defendant a photo of Salinas's house. The detectives said they knew defendant entered the house. Detective Corral stated, "[T]his is your opportunity to tell them the truth or what happened a long time [ago], and why you did it? Maybe somebody forced you to do it or . . . , you had problems with drugs . . . or . . . [y]ou owed someone money?" The detectives repeatedly urged defendant to tell the truth.

Detective Mendoza also suggested that defendant's girlfriend had implicated him in the crime. The detective told defendant, "[Y]our lady . . . she knows what's happening. . . . [¶] . . . [¶] We have . . . your lady's words . . . saying . . . 'that you've done that . . .' now we have you here."

Detective Mendoza mentioned that this was defendant's chance to tell his side of the story. He explained, "[W]e want to know if you're a criminal person . . . that goes around fucking with people . . . or you were a kid who was basically a dumbass . . . that was brain washed, and they made you do a thing that perhaps you normally wouldn't do. . . . I don't know which one of those are you, and that's what we need to determine, if you're the first one. [¶] Or you're the second one because . . . we already know [what happened]." Detective Corral added, "Because when . . . the judge . . . sees everything that's happening, and he's going to see you like this guy is fooling around, is just a liar . . . we are going to fuck him up in court . . . or . . . this dude you know what? He's in a bind, he did something stupid, but this is a kid, a little kid, and maybe . . . this is his opportunity to give him another chance. We don't know, but if I go to the judge, and I saw that you're saying a bunch of lies, what do you think the judge is going to do?" Defendant responded, "He's going to give me time."

The detectives then showed defendant a stack of papers and told him that they already knew a lot about the crime. Detective Corral pulled out a photograph of defendant from the stack of papers. The detectives said, "The reason why we're showing you this photo, is because when we got the evidence back to us . . . it came out with your name, we got your name, we showed him your photo, and the old man said, '[T]hat's the one.' " Defendant continued to deny any knowledge of the crime.

Several times throughout the interview, the detectives referred to defendant's four-month-old daughter and his girlfriend. The detectives stated that if defendant was dedicated to them, he "need[ed] to start talking now with the truth" and that he needed to "think about [his] family." The detectives also repeatedly mentioned that at the time of the crime, defendant was only a 17-year-old "kid" who made a mistake. They urged him "to be a man." Defendant, however, continued to deny any knowledge of or involvement with the crime.

Before a break, defendant told Detective Mendoza, "I wanted to tell you, I think I know something, I want to talk." "I want to talk right with you, so I can just go home," he said. Detective Mendoza asked if defendant needed to use the restroom first, and they took a break so that defendant could use the restroom.

After the break, Detective Corral stated, "[S]o if you decided that you want to talk [to] us, what do you want to talk to us about?" Defendant said he first wanted to know "[h]ow much [time] they can give [him]." Detective Mendoza responded, "You don't be asking about time in jail, all that is for the court man. They decide that." He added, "I can't tell you . . . that is going to be months . . . years . . . probation . . . I can't tell you none of that . . . that's over there at the District Attorney's Office, and with the judge." Detective Corral stated, "[I]f I tell you . . . 8 month[s]. . . you know six months . . . , I would be lying to you. . . . [¶] . . . [¶] So the truth is that . . . we don't know."

Defendant again asked, "[I]f I declare everything well over here . . . like you guys know how long they will give me?" Detective Corral responded that they did not know.

Defendant asked, "But if I do everything good, everything goes positively." Detective Corral answered, "That's what I'm telling you, if . . . you do what I tell you and you behave, and we talk about everything and you're not telling lies. [¶] . . . [¶] We will talk to the District Attorney, and we'll tell them . . . [¶] . . . [¶] [you were c]ooperating with what had happened, and that we can tell them for you, but they are the ones that they do all that." Defendant asked, "If I declare here, declare, where am I going?" Detective Corral responded, "To jail." Defendant then asked whether he was going to juvenile hall or to county jail. Detective Corral stated, "[M]aybe Juvenile, maybe County, we still don't know . . . we know that you were just 17 years old when you did that."

Defendant stated that he did not believe that the detectives had proof of the crime. Detective Corral agreed to give defendant another piece of the evidence in turn for defendant's cooperation. The detective showed him a photo from the file and asked defendant if he knew the man in the photo. Defendant said he knew the man from his neighborhood. The detective reiterated that he already knew everything and asked what happened on that day. After defendant denied knowing anything, Detective Mendoza replied, "So you really don't . . . have interest in changing your life? . . . You think that your lady can do it with your little one by herself? [¶] . . . [¶] You think that she needs you?" Detective Mendoza continued, "Well this is your time to be . . . the man that you need to be. . . . [T]his is your chance here to demonstrate you're gonna be the man that they need, the man . . . the family needs or that you're gonna be the guy that . . . basically leaving little girls everywhere and you don't really care what happens to the kids, only you know what type of person you are."

Defendant asked about the photograph that Detective Corral had shown him. He asked, "Well what you guys have it there? What did he do?" Detective Mendoza responded, "You tell us. [¶] . . . [¶] [W]e already know what happened." Detective Mendoza stated, "[T]his is your chance to tell us . . . what happened, what is that you were thinking, how is it that you got involved in this crap." Defendant answered that at

the time of the crime, he had "just jumped into the hood" two months before and that other gang members wanted to test if he was going to represent the gang. Defendant stated that other gang members had already planned the crime and selected the house before his involvement. When asked about the identity of the other gang members involved, defendant said he did not know. Detective Corral responded, "You want to cooperate with us or not? . . . [B]ecause you have to understand . . . we already know what happened. [¶] . . . [¶] [W]hen the time comes to the District Attorney . . . and the judges . . . and they know that you're playing games, what do you think that they are going to do to you?" The detectives told the defendant that he had to "forget about [his] hood" and think about his family instead.

Defendant then told the detectives that he and his companions entered Salinas's home. This admission took place about two hours and 20 minutes into the interview. He recalled that one of his companions pointed a toy gun at Salinas. Defendant denied being the person who held the gun or the person who tied up Salinas. He stated that he just went inside and grabbed everything he could find. He placed the stolen property in Salinas's car, and then his companions gave him a ride home.

2. Proceedings Below

In his motion in limine to exclude his confession, defendant argued that the confession was not voluntary. The trial court held an Evidence Code section 402 hearing to determine the admissibility of the confession.

Dr. Leo, a social psychologist and an expert in criminology, police interrogations, and involuntary confessions, testified on behalf of defendant. Dr. Leo had reviewed the interrogation transcript and the police reports relating to defendant's case, and he concluded that the interrogation techniques used by the detectives were psychologically coercive. He noted that the detectives used several different techniques such as accusing defendant of lying, using evidence ploys, appealing to religion and family, and minimizing the crime and maximizing the punishment. Dr. Leo also testified that there

were some implied suggestions of leniency and harm running throughout the interview. He pointed out that one of the main themes was that defendant could be treated as a juvenile, which was not as serious as being tried as an adult. He also stated that the references to defendant's family "create[d] a sort of perverse logic that the only way he can get out and help his family . . . is if he confesse[d]." Dr. Leo believed that this was an "implied deal." He opined that even though no express promises were made, the detectives communicated a "message of leniency, immunity, freedom if [he] confess[ed] and . . . the implication of incarceration if [he did not]."

The trial court found that defendant's statements were voluntary and denied defendant's motion to exclude the confession. The trial court "did not find that there were direct or implied promises of leniency that permeated the interrogation . . . to rise to the level of this being an involuntary confession."

3. Analysis

" 'A statement is involuntary if it is not the product of " 'a rational intellect and free will.' " [Citation.] The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he [or she] confessed." [Citation.] " 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" [Citation.]' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347 (*McWhorter*).) The prosecution bears the burden to show by a preponderance of the evidence that a defendant's admission was voluntarily made. (*People v. Carrington* (2009) 47 Cal.4th 145, 169 (*Carrington*).)

" 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' [Citation.]" (*McWhorter, supra,* 47 Cal.4th at p. 347.)

Defendant claims that the detectives used improper coercive tactics by implying that defendant would receive more lenient treatment if he admitted culpability and a harsher penalty if he denied involvement. " 'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made.' " (*People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*).)

Defendant compares this case to *In re Shawn D.* (1993) 20 Cal.App.4th 200 (*Shawn D.*), in which this court concluded that the confession of a 16-year-old minor was involuntary. In that case, the detectives used a number of improperly coercive tactics to induce a confession. The officer repeatedly lied to the minor by telling him that his companion had implicated him in the crime, that there were other witnesses who had identified him, and that he could be tried as an adult. (*Id.* at p. 213.) The officer also referred to the minor's pregnant girlfriend and implied that she would "get 'into trouble' " if the minor did not confess. (*Id.* at p. 214.) In addition, the officer's repeated

suggestions that the minor would be treated more leniently if he told the truth rendered the confession inadmissible. (*Ibid.*) The officer told the minor that he could be tried as an adult (*id*, at pp. 215-216), but then said, "[Y]ou help us get the stuff back and I will personally talk to the D.A. or persons who do the juvenile" (*id.* at p. 216). This court noted that such promises of leniency "in exchange for a confession permeated the entire interrogation." (*Ibid*.)

Unlike *Shawn D.*, there were no express or implied promises of leniency in exchange for defendant's confession. In this case, the detectives repeatedly told defendant that they had no involvement in deciding his penalty and that it was up to the trial court and district attorney to decide. Defendant explicitly asked the detectives, "[I]f I declare everything . . . how long they will give me?" The detectives responded that they did not know, that they could only inform the district attorney of defendant's cooperation, and that the district attorneys "are the ones that . . . do all that." By telling defendant that they could inform the district attorney of his cooperation, the detectives merely suggested that his truthfulness could be beneficial in some unspecified way. (See *Carrington, supra,* 47 Cal.4th at p. 174 [informing the defendant of unspecified benefits of cooperation was not considered a promise of leniency].) Furthermore, the detectives did not suggest that a confession would somehow allow defendant to continue supporting his family. Rather, the detectives' references to defendant's family, and their statements urging defendant to be "the man that you need to be," merely constituted general advice to tell the truth. (See *Holloway, supra,* 33 Cal.4th at p. 115.)

Moreover, we note that nothing in the circumstances surrounding the interview demonstrates that it was unduly coercive. Defendant was 19 years old and therefore an adult at the time of the interview. The interview was conducted in Spanish after defendant stated he preferred to speak in Spanish. The detectives' tone and demeanor throughout the interview was civil and casual, and defendant laughed and smiled several times during the interview. The detectives gave defendant breaks, including a bathroom

break when defendant requested one. Including breaks, the interview lasted only about two hours and 20 minutes before defendant admitted his involvement in the crime.

Additionally, the detectives did not improperly imply that defendant would be penalized for telling a lie. Defendant specifically points out an instance where Detective Corral said that if defendant lied, the judge would "fuck him up in court," but if he told the truth, the judge might view him as "a little kid, and maybe . . . this is his opportunity to give him another chance." In context, it is apparent that the detective was not threatening harsher punishment. Rather, he was urging defendant to tell his side of the story so that the court could consider any mitigating circumstances such as defendant's age and maturity when he committed the crime. (See *Holloway, supra*, 33 Cal.4th at p. 116 [a confession will be invalidated "only where the confession results directly from the threat such punishment will be imposed if the suspect is uncooperative, coupled with a 'promise [of] leniency' "].)

Defendant also claims that the detectives used improper coercive tactics when they falsely informed him that his girlfriend had implicated him in the crime and that his DNA was found in Salinas's home. However, the use of some deception during an interrogation is permissible. The use of deception as an interrogation tactic does not invalidate a confession unless it is reasonably likely that it procured an untrue statement. (*People v. Jones* (1998) 17 Cal.4th 279, 299 (*Jones*).)

In this case, the detectives merely told defendant that they had spoken with his girlfriend, and they vaguely implied that she had implicated him in the crime. The detectives did not explain what his girlfriend had said or how she had implicated him. As to the statements about the DNA evidence, the detectives never explicitly stated that they had found defendant's DNA in Salinas's home. The detectives only said that when they got "the evidence back to [them] . . . it came out" with defendant's name. There is nothing in the record showing that either of these statements was false. In any event, it is apparent that neither of these statements was reasonably likely to procure an untrue

statement (*Jones*, *supra*, 17 Cal.4th at p. 299), as defendant responded that he did not believe that the detectives had proof of the crime.

Even if there was any coercion, that " 'inducement' " was not " 'causally linked' " to defendant's confession. (*McWhorter, supra,* 47 Cal.4th at p. 347.) Indeed, in the face of these allegedly improper inducements, defendant continued to deny involvement in the robbery. Many of the detectives' statements that defendant identifies as improper were made before a break in the interview. His confession was not until after the break when the detectives showed him some photographs and urged him to tell his side of the story.

In sum, under the totality of the circumstances of defendant's interrogation and confession, the prosecution met its burden to show that the detectives did not use improper coercive tactics that overbore defendant's will and rendered the confession involuntary. (*McWhorter, supra,* 47 Cal.4th at p. 347.) We thus conclude that the confession was properly admitted.

B. Prosecutorial Misconduct

Defendant contends that the prosecutor committed two instances of prejudicial misconduct during his closing argument. First, defendant asserts that the prosecutor committed misconduct when he displayed a field interview card, which indicated that defendant had two bullet wounds. This information had been previously excluded from trial in a motion in limine and was later stricken from the investigating officer's testimony. Second, defendant contends that the prosecutor committed misconduct by using inflammatory language that "appeal[ed] to [the jury's] emotion over reason."

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or

reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' " (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*).)

1. Evidence of Defendant's Bullet Wounds

Before trial, defendant moved to exclude from the police interview tapes and transcript any mention of an incident in which defendant was shot. The shooting incident took place after the 2009 burglary, and it was referenced several times throughout the interview. Defendant argued that any mention of the shooting should be excluded because it was prejudicial and irrelevant. Additionally, defendant asserted that he did not receive any discovery as to the shooting incident. The trial court ruled that the prejudicial value outweighed the probative value and excluded the evidence under Evidence Code section 352. The references to the shooting incident were redacted from the transcript and the video of defendant's interview.

During the prosecution's direct examination of Investigator Macias at trial, the investigator discussed what she reviewed on the July 2, 2011 field interview card. She testified that the contacting officer had indicated that defendant had "two bullet holes on his right side, so he might have some scars on his person." Defendant objected to the mention of the bullet holes, arguing that the matter had been expressly excluded by the court in a motion in limine. Defendant moved for a mistrial and asked that the jury be instructed that the prosecution committed misconduct by eliciting the evidence of the bullet wounds.

The prosecutor conceded that he made a mistake by not informing Investigator Macias of the trial court's in limine ruling, but stated that he believed that the ruling only applied to removing references to the bullet wounds and the shooting incident from the interrogation transcript and video.

The trial court denied the motion for mistrial. The trial court found that the prosecution did not expect that the investigator would mention the bullet wounds, and thus, there was no prosecutorial misconduct. Nonetheless, the trial court admonished the

jury that the evidence of the bullet wounds had been ruled "irrelevant to these proceedings" and that the trial court "had previously excluded this because we have no information on those wounds or how they were obtained." The trial court instructed the jury "not to consider that for any purpose in this trial," and that it was striking any references to the bullet wounds from the record.

Later that same day, during argument to the jury, the prosecutor discussed the July 2, 2011 field interview card and displayed the unredacted card on a screen. The unredacted card had a reference to the two bullet wounds. Defendant objected and later moved for another mistrial. Defendant also argued that this was prosecutorial misconduct. The prosecutor responded that he had simply missed the bullet wounds reference and that defense counsel must have missed it too, as she had not said anything when he provided a copy of the exhibit to her earlier. Additionally, the prosecutor stated that he had no time during his lunch break to go through his PowerPoint slides because defendant had "sprung a last second legal issue" on him.

The trial court did not find prosecutorial misconduct and denied the motion for a mistrial. The trial court stated, "I agree that it would have been prudent to remove that [field interview] card from the PowerPoint," but found that it was not misconduct because "the card itself was on the screen for a very short period of time." The trial court also noted that the prosecutor had not referred to the bullet wounds and that the field interview card was shown during a portion of the argument where the prosecutor had been quickly going through evidence of defendant's gang membership.

The prosecutor's references to the bullet wounds do not appear to be the result of "deceptive" or "reprehensible" conduct in an attempt to sway the jury. (See *Smithey, supra*, 20 Cal.4th at p. 960.) The prosecutor explained that his brief display of the field interview card containing a reference to the bullet wounds was inadvertent, and the trial court impliedly found the prosecutor credible on this point. (See *ibid.* [prosecutor commits misconduct if he or she intentionally elicits inadmissible testimony]; *People v.*

Rundle (2008) 43 Cal.4th 76, 160-161 [prosecutor did not commit misconduct by eliciting reference to excluded evidence of an uncharged and unrelated murder in a murder and rape case], disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Even if the prosecutor committed misconduct by showing the field identification card to the jury, it was not prejudicial. The trial court had previously informed the jury that the evidence of the bullet wounds was "irrelevant to these proceedings" and had admonished the jury "not to consider that for any purpose in this trial." We presume, in the absence of evidence to the contrary, that the jury understands and follows instructions from the trial court. (*People v. Fauber* (1992) 2 Cal.4th 792, 823 (*Fauber*).) Moreover, the prosecutor's display of the field identification card was very brief, and the prosecutor did not verbally mention anything about the bullet wounds during argument. On this record, it is not reasonably probable that a result more favorable to defendant would have occurred had the prosecutor not shown the field identification card to the jury. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1264-1265 (*Carter*).)

2. Prosecutor's Reference to Terrorism

During argument to the jury, defendant's trial counsel argued that gangs create "fear from within" the gang. He argued that fear causes a lot of young men to participate in gang activity, as many believe that they would get beaten up or killed if they refuse to participate in crimes.

In rebuttal, the prosecutor asserted that defendant had joined a gang, which is a "violent criminal organization." He asked the jury to "[i]magine a world where you could come in and say that and then hide behind the very gang that you just joined where he can come in and say, yeah, I did all those terrible horrible things. . . . But you know what? Gangs are . . . dangerous and they are violent. So even though I knew that when I joined, I had to do this." The prosecutor argued that if a defendant was allowed to use gang pressure and fear as a defense, "there would be no gang cases that would ever be

convictions. You would essentially be saying gang members, go ahead, run amok. Joining a gang is tantamount to joining like a terrorist organization."

Defendant objected, and after a conference off the record, the trial court sustained the objection as to the "terrorist organization" reference and struck that reference from the record. The prosecutor replied, "The gang law is called street terrorism, which is why I used the term."

After closing arguments and out of the presence of the jury, defendant again raised the issue regarding the "terrorist organization" statement. Defendant argued, "I do believe the entire line of argument and especially the use of the word 'terrorist' was intended to inflame the passions and prejudices of the jury, and I did object as misconduct."

The trial court found no misconduct. The trial court found that the prosecutor's statements were an appropriate rebuttal to defendant's argument and that the statements were not "improper or inflammatory." The trial court mentioned that it had sustained the objection "in an abundance of caution." The trial court explained that it struck the word "terrorism" from the record because it "carries a connotation with it even though . . . the word 'terrorism' [is] in the act itself."

We conclude there was no misconduct as to the prosecutor's reference to a terrorist organization. A "prosecutor is not 'required to discuss his [or her] view of the case in clinical or detached detail.' [Citation.] . . . 'A prosecutor is allowed to make vigorous arguments . . . as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1021.)

The prosecutor referred to a terrorist organization in the context of his rebuttal to defendant's theory that defendant committed the crime due to gang pressures and "fear from within" the gang. Under the circumstances, the prosecutor's comparison of a gang to a terrorist organization did not exceed the bounds of proper argument. The

comparison was used for the limited purpose of providing a familiar example to help the jury's understanding, and not to inflame the jury's passion or prejudice. (See *Jones, supra,* 17 Cal.4th at p. 309 [a prosecutor's comparison between the defendant and a terrorist in a kidnapping and murder case was "fair under the circumstances" and not misconduct].)

Additionally, we note that the word "terrorism" is used in the title of the code section relating to criminal street gangs. (See § 186.20 et seq. ["California Street Terrorism Enforcement and Prevention Act"].) "The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction." (*People v. Poggi* (1988) 45 Cal.3d 306, 327; *People v. Estrada* (1995) 11 Cal.4th 568, 574.) For the same reason, the prosecutor's use of the phrase "terrorist organization" did not amount to misconduct.

Even assuming the reference to terrorism was improper, it is not reasonably probable that a result more favorable to defendant would have occurred had the prosecutor not referred to a terrorist organization. (See *Carter, supra,* 36 Cal.4th at pp. 1264-1265.) The prosecutor's comments were brief, especially as compared to the entirety of his lengthy closing argument. Furthermore, the trial court struck the disputed phrase from the record. We presume that the jury understood and followed the instructions from the trial court to not consider any matters as to which it had sustained an objection. (*Fauber, supra,* 2 Cal.4th at p. 823.)

C. Gang Affiliation Statements

Defendant contends that any gang affiliation statements he made during jail classification interviews should have been excluded because the statements were admitted in violation of *Miranda*.

1. Relevant Proceedings

Prior to trial, defendant moved to exclude any un-*Mirandized* statements about his gang affiliation made during jail classification interviews. The trial court conducted an

Evidence Code section 402 hearing, in which Captain Troy Beliveau of the Santa Clara Country Sheriff's Department testified that questions about gang affiliation are not asked during the "booking process," but are asked after a determination that an individual will be housed in jail. Captain Believeau explained that an inmate's gang classification must be known so that the inmates can be "segregated or housed with their own gang" for security reasons.

At the conclusion of the Evidence Code section 402 hearing, the trial court determined that the gang affiliation statements were admissible. At trial, Investigator Macias testified that defendant indicated to the jail staff on six separate occasions that he was a Sureño.

2. Analysis

In *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), the California Supreme Court held that classification interviews that take place when a defendant is processed into jail constitute custodial interrogation for purposes of *Miranda.* (*Elizalde, supra,* at pp. 527, 530-540.) The Supreme Court explained that "[g]ang affiliation questions do not conform to the narrow exception contemplated in [*Rhode Island v.*] *Innis* [(1980) 446 U.S. 291 (*Innis*)] and [*Pennsylvania v.*] *Muniz* [(1990) 496 U.S. 582] for basic identifying biographical data necessary for booking or pretrial services. Instead, they must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' [Citation.]" (*Id.* at p. 538.) Further, the court held that a defendant's un-*Mirandized* responses to questions about gang affiliation during a classification interview are not within the public safety exception to the definition of custodial interrogation under *Miranda.* (*Elizalde, supra,* at pp. 540-541.) The Supreme Court explained: "Without minimizing the serious safety concerns confronted in jails and prisons, we conclude that the legitimate need to ascertain gang affiliation is not akin to the imminent danger posed by an unsecured weapon that prompted the [*New York v.*] *Quarles* [(1984) 467 U.S. 649]

court to adopt a public safety exception to the requirement of *Miranda* admonitions." (*Id.* at p. 541.)

Finally, the Supreme Court concluded: "To be clear, it is permissible to *ask* arrestees questions about gang affiliation during the booking process. Jail officials have an important institutional interest in minimizing the potential for violence within the jail population and particularly among rival gangs, which ' "spawn a climate of tension, violence and coercion." [Citation.]' [Citation.] To that end, they retain substantial discretion to devise reasonable solutions to the security problems they face. [Citation.] We simply hold that defendant's answers to the unadmonished gang questions posed here were inadmissible in the prosecution's case-in-chief. [Citation.]" (*Elizalde, supra,* 61 Cal.4th at p. 541, fn. omitted.)

As defendant contends and the Attorney General concedes, the trial court erred by admitting into evidence the gang affiliation statements that defendant made during his jail classification interview. We review the erroneous admission of such statements for prejudice under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*Elizalde, supra,* 61 Cal.4th at p. 542.) "That test requires the People here 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citation.]" (*Ibid.*)

Because defendant's gang membership was established by other uncontested evidence presented at trial, the prosecution satisfied its burden to prove beyond a reasonable doubt that the error in admitting the unadmonished gang affiliation statements made during jail classification interviews did not contribute to the verdict. In addition to these gang affiliation statements, the prosecution presented evidence that defendant admitted his Sureño gang membership to law enforcement officials on July 2, 2011 and July 11, 2009 during field interviews. Additionally, during the July 2, 2011 contact, defendant was wearing a blue shirt and a blue belt with the letter "M" on the belt buckle. Officer Pires testified at trial that during the July 11, 2009, defendant admitted that he

was a VPL member, and that he wore blue slippers and a blue bandana that day. Defendant also wore a South Pole shirt and a blue cloth belt during his July 15, 2011 interview. Furthermore, defendant had three dots tattooed on his hand. Investigator Macias testified that the three-dot tattoo, the letter "M," the color blue, and references to the south all represented the Sureño gang. Moreover, field interview cards from contacts on July 11, July 15, August 7, August 9, and October 10, 2009 all indicated that defendant was contacted while he was with known Sureño gang members. Also, in at least two instances, defendant was contacted while he was in a Sureño neighborhood. Investigator Macias opined that based on defendant's admissions, the tattoo, and the other information from the field interview cards, defendant was a Sureño gang member.

Moreover, at trial, Perez testified that defendant was a VSM member who went by the moniker "Little Silent." Defendant also admitted in his interview that he was known as "Little Silent." Investigator Macias testified that monikers were a common characteristic in gangs.

In light of all the aforementioned evidence, we conclude that defendant's gang membership was established independently from the gang affiliation statements he made during jail classification interviews. Therefore, the erroneous admission of those statements was harmless beyond a reasonable doubt. (*Elizalde*, *supra*, 61 Cal.4th at p. 542; *Chapman*, *supra*, 386 U.S. at p. 24.)

D. Cumulative Impact of Errors

Defendant contends the cumulative impact of the alleged errors—the admission of his confession, the prosecutorial misconduct, and the admission of his gang affiliation statements—violated his federal due process rights.

The California Supreme Court has stated that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Here, we have found only one error—admission of defendant's gang affiliation statements, and we

have concluded that the error was harmless because there was ample evidence independently establishing defendant's gang membership. We must therefore reject defendant's claim of cumulative error.

E. Gang Allegation and Sentencing

Lastly, defendant argues that the trial court erred in finding that it had no discretion under section 1385[5] to strike the section 186.22, subdivision (b)(4)[6] gang allegation, which was the basis for its imposition of a prison term of 15 years to life for count 2. Defendant further contends that the prison term of 15 years to life for count 2 constitutes cruel and unusual punishment.

1. Motion to Strike Life Term and Sentencing Hearing

Prior to sentencing, defendant requested that the court use its section 1385 discretion to strike the section 186.22, subdivision (b)(4) gang allegation. Defendant called Francesca Lehman, an expert in clinical forensic psychology and neuropsychology, to testify on his behalf. Dr. Lehman testified that 17 year olds are more susceptible to outside influences and impulsive behavior. Based on her review of defendant's background, she opined that defendant was exposed to several risk factors that made him susceptible to gang membership. Dr. Lehman also stated that a lot of gang members desist in active gang participation around the age of 18 and that defendant had reported he desisted from gang activity around that age.

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[5] Section 1385, subdivision (a) states in relevant part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

[6] Section 186.22, subdivision (b)(4) states: "Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [¶] . . . [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery. . . ."

Defendant argued that the trial court had the discretion under section 1385 to strike the gang allegation and that the trial court should exercise its discretion based on the mitigating factors discussed by Dr. Lehman and in the probation report. Furthermore, defendant argued that a life term would be disproportionate to his culpability, given that defendant was only 17 years old at the time of the crime, he had no part in planning the crime, an older gang leader told him what to do, and Salinas was not injured during the crime.

After taking the matter under submission, the trial court denied the request to strike the section 186.22, subdivision (b)(4) gang allegation. Relying on *People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*), the trial court found that it did not have the discretion to strike the gang allegation as it was an alternative punishment. (See *id.* at pp. 448-449.) The trial court further stated even if it did have the discretion to strike the gang allegation, it would not have done so in this case because it was not "an unusual case" that would warrant a dismissal. The trial court looked to the totality of circumstances, stating: "[T]he fact that this case involved a weapon . . . [defendant] was clearly there. The victim was very vulnerable. They did go into someone's residence. He was duct-taped. And that conduct is significant and threatening not only to that victim, but to the community. Even taking into consideration his age, the culpability of the co-defendants, I do not find that to be an unusual case that we are taking outside of that sentencing scheme."

2. Analysis

Defendant acknowledges that the court in *Campos, supra,* 196 Cal.App.4th 438 held that a trial court has no discretion to strike a section 186.22, subdivision (b)(4) gang allegation, but he nonetheless argues that *Campos* was wrongly decided.[7]

[7] The issue of whether the trial court had discretion under section 1385 to strike a section 186.22, subdivision (b)(4) gang allegation is currently pending before the (continued)

The *Campos* court considered whether section 186.22, subdivision (g)[8] and section 1385 gave the trial court discretion to strike a section 186.22, subdivision (b)(5) gang allegation, which, similar to section 186.22, subdivision (b)(4), imposes a minimum parole eligibility term for certain felonies committed for the benefit of a criminal street gang. (*Campos, supra,* 196 Cal.App.4th at pp. 448-454.) The court first concluded that section 186.22, subdivision (g) did not give the trial court discretion to strike the section 186.22, subdivision (b)(5) gang allegation because section 186.22, subdivision (g) only applies to sentencing enhancements and not alternative penalty provisions. The court explained: " ' "Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself*. . . ." ' [Citation.] " (*Campos, supra,* at p. 449.) Second, the *Campos* court determined that section 186.22, subdivision (g) precludes a trial court from exercising its discretion under section 1385, subdivision (a) to strike sentencing allegations. (*Campos, supra,* at p. 452.) The court determined that the existence of section 186.22, subdivision (g) and its language provided " 'clear legislative direction' " that section 1385, subdivision (a) did not apply to a section 186.22 gang allegation. (*Campos, supra,* at pp. 453-454.)

In this case, the trial court explicitly stated that it would not have struck the gang allegation even if it had discretion to do so, because it was not "an unusual case" in which

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California Supreme Court. (*People v. Venegas* (2014) 229 Cal.App.4th 849, review granted Dec. 10, 2014, S221923; *People v. Fuentes* (2014) 225 Cal.App.4th 1283, review granted Aug. 13, 2014, S219109.)

[8] Section 186.22, subdivision (g) states: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

the punishment under section 186.22, subdivision (b)(4) would be inappropriate. Thus, we need not address whether *Campos* was correctly decided.

Next, we turn to defendant's contention that his 15-years-to-life sentence constituted cruel and unusual punishment. "Cruel and unusual punishment is prohibited by the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. [Citation.]" (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted; see also *Ewing v. California* (2003) 538 U.S. 11, 20, 23 (*Ewing*).)

"The main technique of analysis under California law is to consider the nature both of the offense and of the offender. [Citation.] The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.] [¶] The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494; see also *Ewing*, *supra*, 538 U.S. at p. 25.)

Whether a sentence constitutes cruel and unusual punishment is a question of law. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1474.) A reviewing court therefore applies the de novo standard of review when determining whether a defendant's sentence is cruel and unusual punishment. (*Ibid.*)

Defendant compares this case to *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*). Mendez was 18 years old at the time of sentencing and 16 years old at the time he committed his crimes (carjacking, assault with a firearm, second degree robbery,

and gang and gun enhancements). (*Id.* at pp. 50, 63.) He was sentenced to 84 years to life in prison. (*Id.* at p. 62.) The defendant challenged his sentence, arguing that it constituted cruel and unusual punishment. The appellate court agreed. The appellate court relied on principles stated in *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), which held that juveniles who commit nonhomicide crimes may not be sentenced to life without parole (LWOP). Although Mendez was not technically sentenced to LWOP, the court observed that he was likewise deprived of " 'any meaningful opportunity to obtain release' " even if he demonstrated rehabilitation. (*Mendez, supra,* at p. 63.) Additionally, the appellate court determined that even without analogizing to *Graham*, the sentence would be unconstitutional because it was grossly disproportionate to Mendez's crime and culpability. (*Mendez, supra,* at p. 64.) The court cited to the defendant's age and the fact that he did not personally inflict injury on his victims as compelling factors raising a strong inference that his sentence was cruel and unusual.

Mendez is distinguishable in one major respect: defendant's sentence is 15 years to life, as opposed to the sentence of 84 years to life in *Mendez*. Thus, defendant's sentence is far more lenient than Mendez's sentence. Defendant has an opportunity to be released after serving a 15-year prison term. Although defendant's age at the time of the crime, his personal history, and his role in the crime are mitigating factors we consider, those factors do not outweigh the seriousness of the crime. Defendant and two other gang members entered Salinas's home at night, tied up Salinas, who was an elderly man, stole items from the home, and drove away in Salinas's car. Furthermore, one of the gang members was armed with a gun during the incident. Although no one was physically hurt, Salinas suffered emotional harm, as he stated that he was scared and had feared getting hurt. In light of these circumstances, we cannot conclude that the sentence was grossly disproportionate to defendant's crime and culpability. We therefore conclude that defendant's sentence did not constitute cruel and unusual punishment.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.